No. 42661-7--II

COURT OF APPEALS, DIVISION TWO,

OF THE STATE OF WASHINGTON

CLALLAM COUNTY No. 11-1-00219-4

STATE OF WASHINGTON,

Respondent/Plaintiff,

vs.

CHANNING DAVIS,

Appellant/Defendant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

COUNTERSTATEMENT OF THE ISSUES

ISSUE ONE

Does a prosecutor's use of the personal pronoun "I" indicate in any manner the personal belief of the prosecutor, unless the personal pronoun "I" is followed with a statement affirming the prosecutor believes the evidence is sufficient to convict?

ISSUE TWO

When the record contains no evidence a juror ever saw the defendant's leg restraint and also shows the efforts made by the Court to ensure no one saw the leg restraint, is any error harmless in failing to conduct a hearing before placing a restraint on a prisoner?

ISSUE THREE

Is there sufficient evidence of substantial bodily harm when the evidence shows the victim was left in pain and blood for approximately four hours, was groggy when found, had difficulty speaking, required medical care, was diagnosed with a concussion and was discharged from custody because his injuries were so great?

ASSIGNMENT OF ERROR

1. The trial court erred by refusing to provide an instruction defining "disfigurement" by holding the jury understands the term and by confusing the term with "substantial."

ISSUE FOUR

Did the Trial Court err when it decided not to give an instruction that would have informed the jury, assisted the State to argue its case more clearly, and was a correct statement of the law?

STATEMENT OF FACTS

Trial commenced on September 12, 2011 (RP 9/12/2011 3). After discussing potential witnesses and jury seating issues, the Court addressed Mr. Davis. The Court told Mr. Davis not to leave the courtroom during recess until the Court tells him to leave so it will appear to the jury that he is not in custody (RP 9/12/2011 5). The Court further explained that, if Mr. Davis chose to testify, the Court would send the jury out until Mr. Davis was seated in the witness chair "so they don't see you got a stiff leg on or suspect that at all [.] [Just kind of stay here so we can not let the jury see you're going out the back door here, okay." (RP 9/12/2011 6).

Dr. William Washington testified on behalf of the State (RP 9/12/2011 35). He provided emergency medical coverage for Forks Community Hospital (RP 9/12/2011 37). He was working on June 5, 2011, when he examined Keenan Ekegren (RP 9/12/2011 38). He described Mr. Ekegren as having "swelling about the face and head. Contusions, fancy name for bruises." (RP 9/12/2011 39). Mr. Ekegren told the Doctor he didn't know what happened; he woke up and found himself beat up. The last thing he remembered was lying down, being cared to for his wounds. (RP 9/12/2011 39). Mr. Ekegren was mentally clear, alert, oriented (RP 9/12/2011 39). The Doctor concluded the loss of memory was secondary to loss of consciousness, as if he was struck and

immediately lost consciousness. (RP 9/12/2011 40). Mr. Ekegren stated his face hurt, his head hurt, he had a pounding headache, his ears hurt, his mouth hurt, and his cheeks hurt. (RP 9/12/2011 40). From the swelling and ecchymosis, bruising, some bleeding from his mouth, and tenderness to the back of his head, the doctor concluded he was struck about his mouth, his cheeks, his head and his bilateral ears (RP 9/12/2011 41). The doctor diagnosed Mr. Ekegren with a concussion secondary to head trauma, with secondary obvious contusions of the face and head, and orbital region, around the eyes (RP 9/12/2011 42). Because he had no memory of what had occurred, the doctor concluded the assault was obviously a traumatic experience (RP 9/12/2011 43). The doctor then explained that the risks associated with a concussion were "a post-concussive syndrome in which case you're concerned about potential seizures and if you have seizures that can possibly lead to further seizures and such as an epilepsy syndrome." (RP 9/12/2011 43). Dizziness and headaches are very common and can be prolonged as well. (RP 9/12/2011 43). Mr. Ekegran was given Vicodin – a mixture of acetaminophen and hydrocodone – to control pain. (RP 9/12/2011 44).

Dr. Washington was asked about how long the swelling around the eye would last. He answered, "contusions in general are typically going to last 2 to 3 weeks, particularly about the face." The contusions would be

painful (RP 9/12/2011 45). There were no fractures. (RP 9/12/2011 51). A CAT scan was negative (RP 9/12/2011 53).

Officer Prose, Forks correction officer (RP 9/12/2011 63), testified next. Mr. Davis, an inmate at the jail, approached him at approximately 10:15 a.m. and told him he had been in a fight with another inmate (RP 9/12/2011 64). The officer went to a cell and found Mr. Ekegren with "trauma, swollen face." (RP 9/12/2011 65). The officer observed swelling to the face, blood around his mouth and blood on the floor. (RP 9/12/2011 65). He asked Mr. Ekegren if he was okay; Mr. Ekegren asked to go to the hospital. (RP 9/12/2011 65). Mr. Ekegren was alert and conscious. (RP 9/12/2011 65). He never stood up from his bed and was removed on a gurney (RP 9/12/2011 68). Breakfast is usually served at 6:00 a.m. (RP 9/12/2011 70).

Sergeant Ed Klahn, Forks jail sergeant (RP 9/12/2011 71), testified he arrived on June 5, 2011 at 10:30 in the morning and observed that the inmates were locked down. (RP 9/12/2011 72). He went to Mr. Ekegren, who was lying on a bunk and observed his face was swollen and there was blood on him and the floor. (RP 9/12/2011 73). Mr. Ekegren had difficulty speaking because of the injuries to his face. (RP 9/12/2011 73). He seemed kind of groggy, not really exactly there, but his mental status improved over time (RP 9/12/2011 73). Based upon his evaluation of the

situation, he believed Mr. Ekegren needed to be seen by a doctor (RP 9/12/2011 74). Mr. Ekegren was released from custody at the hospital and did not return to the jail, because "[h]e was going to need time to heal and we just released him from our custody." (RP 9/12/2011 75).

Exhibits 1 through 9 were presented and admitted (RP 9/12/2011 79). Exhibit 1 is a booking photo Mr. Davis (RP 9/12/2011 80). His height is 5'11" and his weight is 200 pounds (RP 9/12/2011 81). Exhibit 5 is a booking photo of Mr. Ekegren (RP 9/12/2011 81). Exhibit 6, 7, 8 and 9 are photos of blood splatter on the floor and the wall in the jail cell (RP 9/12/2011 82). Exhibits 10, 11, 12, and 13 were presented and admitted (RP 9/12/2011 84). Each photo provided a different view of the injuries to Mr. Ekegren (RP 9/12/2011 82-85). Exhibit 15 is a video from the jail's security camera (RP 9/12/2011 86), admitted (RP 9/12/2011 90). The video showed Mr. Ekegren leaving cell 3 with injuries to his face, while Mr. Davis washed his hands before he left cell number 3, after Mr. Ekegren (RP 9/12/2011 98-99).

Mike Rowley, City of Forks police officer (RP 9/12/2011 102), testified next. He testified that he went to the Forks hospital on June 5, 2011 at 11:15 hours (RP 9/12/2011 102). He saw Mr. Ekegren with a head wrap on, with what the officer considered severe swelling to his face, trauma with blood and what appeared to be stitches (RP 9/12/2011 103).

Exhibit 14, admitted, is a photo taken of Mr. Ekegren by Officer Rowley that day (RP 9/12/2011 103).

While waiting for his last two witnesses, the State proposed they discuss the disfigurement instruction (RP 9/12/2011 105). Mr. Davis objected to the instruction, stating "the WPIC's [sic] are sufficient." (RP 9/12/2011 106). There was no further discussion at that point.

At the end of the judicial day, the Court inquired of the bailiff whether everyone had left and whether there was anybody coming down the hall. He was told there was no one left. The Court then said to [CO] Eric [Morris], "you just have to be conscious of the fact when the jury's leaving for lunch or whatever, for the day, that we've got several people using the hallway coming back. So you just got to make sure that you don't run into them --." (RP 9/12/2011 109). Court adjourned.

After Officer Rowley testified the Forks jail is in the State of Washington (RP 9/13/2011 4), Sean Riley, an inmate in the Forks jail on June 5, 2011 (RP 9/13/2011 5), testified he saw Mr. Davis "choking out "Keenan" in his cell (RP 9/13/2011 6). He testified he was returning from breakfast when he observed Mr. Davis over on top of Keenan Ekegren, who was lying down on the floor, with his legs on the floor and his arms, dangling (RP 9/13/2011 8). Mr. Davis was choking Mr. Ekegren; it appeared to Mr. Riley that Mr. Ekegren was "probably out

already." (RP 9/13/2011 8). He had heard sounds "like someone getting nailed – sounded like someone getting punched" while eating breakfast, so he returned to his cell (RP 9/13/2011 10). When Mr. Riley saw Mr. Ekegren later, Mr. Ekegren was "trying to say something [ ] but he [w]asn't really getting much out." (RP 9/13/2011 11). On cross, he clarified that Mr. Davis was kind of in front or Mr. Ekegren, standing over him, and had him in a headlock (RP 9/13/2011 13). It appeared Mr. Ekegren was not resisting any more at that point. (RP 9/13/2011 13). He had not observed any of the commotion before the 5 seconds he saw of the headlock. (RP 9/13/2011 14). When Mr. Bates and Mr. Ekegren did not respond to the bailiff's call, the State rested. (RP 9/13/2011 15). Mr. Davis moved to dismiss (RP 9/13/2011 16), stating the evidence was insufficient for 2nd Degree Assault. (RP 9/13/2011 17). The State argued the evidence supported each element, including the impairment of the function of a body part or organ. (RP 9/13/2011 19). The Court held there was sufficient evidence to send the case to the jury "based upon the definition of substantial bodily harm." The Court continued:

> "Which as Mr. Troberg points out says involves a temporary but substantial disfigurement. I think there's evidence to support that based upon the descriptions that have been made of Mr. Ekegren and the photographs that were taken of him[. H]is face was temporarily but substantially disfigured. The jury certainly doesn't have to find that but, I think there's enough evidence here to support a reasonable jury if they want to make that conclusion.

> Also the doctor diagnosed that he suffered – Mr. Ekegren suffered a concussion, which is a lack of consciousness, that would also fit under the definition of substantial loss or impairment of the function – a temporary substantial loss or impairment of the function of any bodily part. If you go unconscious you've lost function of your brain for a short period of time, however long you're unconscious.
>
> So, I think that fits there as well as I think the supporting evidence of that is sufficient enough to support the doctor's conclusion. Also there was evidence again that he wasn't able to speak for a period of time or could not speak well at first, seemed to [be] groggy, that kind of thing, that all fits in to the concussion [, I think,] element. So I think there's enough there to send it to the jury and let the jury make a decision." (RP 9/13/2011 20-21).

Mr. Davis testified next. (RP 9/13/2011 22). Prior to his movement to the witness stand, the jury was sent out (RP 9/13/2011 15). The Court directed him to take the witness stand before the jury was brought back in, and remain there until the jury was excused again (RP 9/13/2011 21). He testified that Mr. Ekegren assaulted him and he defended himself (RP 9/13/2011 24). He explained that he had gone to Mr. Ekegren's cell to talk to him because he had heard his name brought up as somebody who was at a party at his dad's house when things came up missing. (RP 9/13/2011 23). Mr. Ekegren started swinging at him after he closed the cell door (RP 9/13/2011 24). He put Mr. Ekegren in a headlock to get him to stop fighting. (RP 9/13/2011 25). Mr. Davis did not report the injuries

to Mr. Ekegren for four hours because there was no movement until then (RP 9/13/2011 29).

The "disfigurement instruction" was addressed after both parties rested. The Court decided not to give the instruction:

> The other thing is on disfigurement and I am not going at this point to give the instruction out of the Atkinson case. I don't think disfigurement is a hard word for the jury to figure out and I don't think there's any question here that there was some disfigurement. The issue in this case is whether there was substantial disfigurement which is required by the definition of what that means, substantial bodily harm. So I'm not going to give it, I just think – to me it's – it almost takes away – the definition almost takes away from the requirement that there has to be substantial disfigurement.
>
> Because the way this – even though it was approved by Division 3, I'm reluctant to give it because I think it conflicts with that element. So, in other words, if somebody just had a small bruise, say much smaller black eye, under this definition it seems to say okay, that can be a substantial disfigurement. I mean – anyway I'm not going to give it. (RP 9/13/2011 46-47).

The State objected to the Court's refusal to give the disfigurement instruction (RP 9/13/2011 50).

The jury was brought in, given instructions, and the State began its first closing argument (RP 9/13/2011 54). He used the term "I'd argue"[1], "I'll reiterate,"[2] etc. in his closing arguments. No objection was raised.

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[1] "Obviously it's very important to Mr. Davis, I'd argue as well it's important to the people of the State of Washington as well." (RP 9/13/2011 54).

[2] "And the judge has read it to you but I'll reiterate the part that I'd argue is important." (RP 9/13/2011 55).

No limiting instruction was requested. The jury found Mr. Davis guilty of Second Degree Assault. (CP 7).

ARGUMENT

PROSECUTORIAL MISCONDUCT

ISSUE ONE

Does a prosecutor's use of the personal pronoun "I" indicate in any manner the personal belief of the prosecutor, unless the personal pronoun "I" is followed with a statement affirming the prosecutor believes the evidence is sufficient to convict?

A. The deputy prosecutor made no statements that could be considered a personal opinion about the sufficiency of the evidence.

Mr. Davis argues both that using the pronoun "I" in argument is a "bad habit"[3] and vouched for the evidence or gave a personal opinion of his guilt. He admits that defense counsel did not object during trial and no curative instruction was given. He understands that, absent an objection, the claim of error is only reviewable if the error is "so flagrant and ill intentioned that it evinces an enduring and resulting prejudice incurable by a curative instruction." *State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008).

Use of pejorative terms that comment on a defendant or his witness, are improper and may be prejudicial. *State v. Monday*, 171

[3] Note 1, page 9, Appellant's brief.

Wn.2d 667, 257 P.3d 551 (2011) (use of pejorative language to describe defense witnesses was an attempt to discount their testimony). A prosecutor is expected to remember that defendants, too, are among the people he or she represents; the defendant is owed a duty to see that their right to a fair trial is not violated. *Monday*, 171 Wn.2d at 676. A flagrant or apparent intentional appeal to racial bias in a way that undermines the defendant's credibility will be vacated unless the State proves beyond a reasonable doubt the error is harmless. *Monday*, 171 Wn.2d at 680.

In addition, the jury was instructed it was not to consider counsel's opinions or statements as evidence. The jury was instructed:

> The lawyer's *remarks, statements*, and *arguments* are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. [ ] *You must disregard any remark, statement*, or *argument* that is not supported by the evidence or the law in my instructions. (emphasis added) (CP 26).

The State deputy prosecutor's continual use of the term "I'd argue" tells the jury he is arguing a position. Nothing he said would inform the jury that it was his personal opinion.

For instance, the first example cited by Mr. Davis reads: "I'd argue to you that I've done that [.]" If he had said "I've done that" or "I believe I have done that," it still would not be vouching for evidence or giving a personal opinion about whether Mr. Davis was guilty. The

deputy prosecutor was merely saying he believed that he had presented evidence sufficient to convict beyond a reasonable doubt.

The sort of misconduct Mr. Davis speaks of arose in *State v. Case*, 49 Wn.2d 66, 72, 298 P.2d 500 (1956), where the deputy prosecutor interjected himself, his opinions, his beliefs, his values, and his dislike for organized religion. *Case* provides an excellent example of improper assertion of personal belief. The prosecutor expressed his opinion "about what this evidence shows and how clearly this evidence indicates that this girl has been violated. This girl has been sexually attacked by a person; by a man by her father." *Case*, 49 Wn. 2d at 68. The prosecutor delivered a dissertation on sex deviation, explaining how it occurs in society, how it is a disease and ended with "It is something in the brain and mind and goes all over the area." Defense counsel finally objected. *Case*, 49 Wn.2d at 69. The prosecutor made other equally unacceptable comments and the Supreme Court reversed, based on the cumulative effect of the prosecutor's repeated improprieties in argument. *Case,* 49 Wn. 2d at 73.

State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984), cited by Mr. Davis, provides an example of a trial at its worst. As the Supreme Court stated, it was more like a portion of Camus' "The Stranger." *Reed,* 102 Wn.2d at 146. The comments by the deputy prosecutor were so bad the State conceded there was error.

Mr. Davis states on page 9 that the deputy prosecutor used the personal pronoun "I" approximately 60 times. Perhaps it is poor argument style, but counting the pronoun "I" misses the point. The term must express a personal opinion, which is not conveyed by "I'd argue." If the deputy prosecutor had said, "I think there is evidence beyond a reasonable doubt," that would be an opinion. "I would argue there is evidence beyond a reasonable doubt" is argument. There simply is no error.

B. There was no objection at trial so the defendant must show any error was flagrant, ill-intentioned and created a substantial likelihood the misconduct affected the jury's verdict.

The defendant must demonstrate that the prosecutor's [comments] were both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). In most cases, however, failing to object to an improper comment and to seek a curative instruction waives any error, unless the comments is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction. *Brown,* 132 Wn.2d 529.

Even if there were error, there is nothing to support that the "error" created a substantial likelihood the misconduct affected the jury's verdict. *Brown,* 132 Wn. 2d 561. The examples provided by Mr. Davis are insignificant in comparison to the kinds of comments which the Courts

have found "flagrant and ill-intentioned." In *State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009), for instance, the prosecutor presented what the Court called "propensity evidence" and then argued in closing in a manner that would imply the defendant was a serial offender. *Fisher,* 165 Wn.2d at 757.

To determine whether reversible error has occurred, a prosecutor's comments are viewed in the context of the entire argument, and a prosecutor enjoys wide latitude "in drawing and expressing reasonable inferences from the evidence." *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006), quoting *State v. Gentry*, 125 Wn.2d 640, 888 P.2d 1105 (1995). Nothing in the comments of the deputy prosecutor shows he was saying anything to express an opinion. Certainly, nothing in the record shows his actions were "flagrant and ill-intentioned." The term "I'd argue" is not error at all, especially in light of the jury instruction that tells the jury that arguments are not evidence. But, if there was error, it is not reversible error. There was no objection, no attempt to cure the issue, and no curative instruction.

SHACKLING

ISSUE TWO

When the record contains no evidence a juror ever saw the defendant's leg restraint and also shows the efforts made by the Court to ensure no one

saw the leg restraint, is any error harmless in failing to conduct a hearing before placing a restraint on a prisoner?

A. The State concedes the Court did not conduct a hearing before permitting the jail to bring Mr. Davis to the courtroom with a leg restraint.

Mr. Davis contends the Court erred when it permitted the jail personnel to bring him to court with a leg restraint. He is correct that there are no findings to establish that he posed an imminent risk of escape, intended to injure anyone or could not behave in an orderly manner while in the courtroom. The actual trial record shows Mr. Davis was respectful and courteous throughout the trial.

B. The error is harmless because nothing in the record shows that any juror saw the leg restraint because of the Court's care in keeping the defendant from moving about.

The actual trial record, however, shows the Court ensured no juror saw Mr. Davis' leg restraint. Mr. Davis was seated before the jury came in and seated when they left. He was seated in the witness chair when the jury was out. He was directed to remain in the witness chair until the jury was excused after this testimony.

The record does not show that any juror observed Mr. Davis' leg restraint. Without anything in the record to establish a juror observed the leg restraint, there is nothing to address on appeal. Moreover, the burden is on Mr. Davis to show the shackling had a substantial or injurious effect or influence on the jury's verdict. *State v. Hutchinson*, 135 Wn.2d 863,

888, 959 P.2d 1061 (1998), cert. denied, 525 U.S. 1157, 119 S.Ct. 1065, 143 L.Ed.2d 69 (1999). Further, every case cited by Mr. Davis involved situations in which a juror or the jury saw extensive shackling of the defendant. *State v. Hartzog*, 96 Wn.2d 383, 635 P.2d 694 (1981) (prison policies insufficient basis to require shackling; Court must independently determine whether the defendant poses a danger to others); *State v. Finch*, 137 Wn.2d 792, 865-66, 975 P.2d 967 (1999)(leg shackles and handcuffs[4]on a prisoner charged with two counts of aggravated first degree murder).

Further, *State v. Clark*, 143 Wn.2d 731, 777, 24 P.3d 1006 (2001), cert. denied, 534 U.S. 1000, 122 S.Ct. 475, 151 L.Ed.2d 389 (2001), held shackling could be harmless error when there was no possibility the jury would have known the defendant was shackled:

> The trial court made sure Clark was not moved in or out of the room in the presence of the jury, both counsel tables had protective skits, the shackles were taped to eliminate any noise, and the jury never saw [the defendant] in motion during the guilt phase.

Id. at 777. The Court then held that Mr. Clark was not prejudiced by being shackled and the error harmless beyond a reasonable doubt. In Mr. Davis' case, the Court made sure he was not moved in or out of the room

[4] During the testimony of two witnesses, he was handcuffed to his chair and his shackles handcuffed to the table leg. *State v. Finch*, 137 Wn.2d at 850-51.

(or about the room) in the presence of the jury and the leg restraints are not visible by glance.

In both *Elmore* and *Clark,* the real question is whether the record shows the defendant was denied an opportunity to appear like any other defendant, with nothing to indicate he or she is particularly dangerous and violent. Where the Court permits the jail to use a leg or knee restraint, but takes extra precaution to ensure the jury has no opportunity to see the restraint, the burden must shift to the defendant to show he or she was denied the right to appear like every other defendant. Otherwise, the defendant cannot establish prejudice. There was no prejudice to Mr. Davis in this case.

In *Finch,* 137 Wn.2d at 845, the Supreme Court also held that shackles are inappropriate if they interfere with a defendant's ability to assist his counsel during trial, interfere with his right to testify during trial and it offends the dignity of the judicial process. Mr. Davis wore an unobtrusive leg band under his clothes. Mr. Davis sat at the counsel table with his attorney. When it came time for him to testify, the jury was excused so he could get into the witness chair.[5] He did not move from the witness chair until after the jury retired. Mr. Davis appeared in court like every other defendant, except he had a hidden restraint that was not

[5] A witness's legs are hidden while in the witness chair.

visible, did not interfere with his defense and certainly did nothing to offend the dignity of the Court.

SUFFICIENCY OF THE EVIDENCE

ISSUE THREE

Is there sufficient evidence of substantial bodily harm when the evidence shows the victim was left in pain and blood for approximately four hours, was groggy when found, had difficulty speaking, required medical care, was diagnosed with a concussion, and was discharged from custody because his injuries were so great?

The evidence of a severe beating with substantial bodily injury was proven beyond a reasonable doubt. The evidence clearly shows Mr. Ekegren suffered substantial disfigurement and substantial impairment of a function of a bodily part.

Mr. Davis contends the State did not prove beyond a reasonable doubt that he inflicted substantial bodily harm. Mr. Davis argues the evidence of injury was insufficient to meet that element of second degree assault.

The test for reviewing whether the evidence is sufficient to support a conviction is set out in *State v. Salina,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992):

> The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against

> the defendant. *State v. Partin,* 88 Wn.2d 899, 906–07, 567 P.2d 1136 (1977) [*disapproved on other grounds by State v. Lyons,* ___ Wn.2d ___, ___ P.3d ___ (2012)]. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff,* 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd,* 95 Wn.2d 385, 622 P.2d 1240 (1980).

To convict Mr. Davis of second degree assault, the State had to prove Mr. Davis "recklessly inflicted substantial bodily harm on Mr. Ekegren (CP 33; "to convict" instruction). "Substantial bodily harm" was defined for the jury as follows:

> Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

(CP 38; instruction 12).

The State has three methods by which to prove "substantial bodily harm." It can prove (1) a temporary but substantial disfigurement, or (2) injury that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or (3) injury that causes a fracture of any bodily part. The State proved options (1) or (2) or both (1) and (2).

The evidence proved that an inmate heard a fight while eating breakfast, an inmate named Sean Riley heard sounds that he believed were "like someone getting nailed – sounded like someone getting punched" so he returned to his cell (RP 9/13/2011 10). Breakfast is usually served at 6:00 a.m. (RP 9/12/2011 70). Mr. Davis told Corrections Officer Prose

he'd been in a fight with another inmate at approximately 10:15 a.m., roughly four hours later (RP 9/12/2011 64). Four hours later, after the alleged "fight", Officer Prose found Mr. Ekegren in his cell, wanting to go to the hospital. Sergeant Klahn examined Mr. Ekegren at 10:30 a.m. His face was swollen, there was blood on the floor, blood on him. Mr. Ekegren had difficulty speaking due to the injuries to his face. He still seemed kind of groggy, not really exactly there (RP 9/12/2011 73). The injuries were serious enough that Sergeant Klahn decided he needed to be seen by a doctor (RP 9/12/2011 73-4). His injuries were serious enough that he was not returned to custody after the trip to the hospital (RP 9/12/2011 74).

In addition to exhibit 14, taken long after Mr. Ekegren had been cleaned up and was being released from the hospital, the State has provided Exhibits 5-13, which provide a more complete picture about what Mr. Ekegren's injuries looked like. They also show the condition of his cell after the beating. The photos show a person who has suffered substantial trauma to his face and head. The photos of the cell show this was no minor assault.

Dr. William Washington testified to Mr. Ekegren's injuries (RP 9/12/2011 36). He testified that Mr. Ekegren showed swelling about the face and head, contusions (RP 9/12/2011 38). Mr. Ekegren could not

provide information, telling the doctor he didn't know what happened; he woke up and found himself beat up (RP 9/12/2011 39). Mr. Ekegren reported he had a pounding headache, his ears hurt, his mouth hurt and his cheeks hurt (RP 9/12/2011 40). Dr. Washington viewed injuries to Mr. Ekegren's face, with bruising and bleeding, and tenderness to the back of his head (RP 9/12/2011 41). Dr. Washington diagnosed that Mr. Ekegren suffered a concussion (RP 9/12/2011 42). Dr. Washington outlined the risks associated with a concussion, including potential seizures that could possibly lead to epilepsy (RP 9/12/2011 43).

Taken together, the evidence presented at trial shows a serious and severe beating. The jury was entitled to determine the injuries were substantial even without the concussion diagnosis, based on the severity of the facial and head injuries. The jury was entitled to find the injuries were serious enough that Mr. Ekegren was groggy and could barely speak four hours later. The jury had evidence of disfigurement, which was defined in *State v. Atkinson,* 113 Wn.App. 661, 667, 54 P.3d 702 (2002), as "'[a]n impairment or injury to the appearance of a person or thing.'" The photos show Mr. Ekegren's entire appearance was substantially impaired or injured. The jury also had evidence that there was a temporary but substantial loss or impairment of the function of any bodily part or organ because the record shows Mr. Ekegren could not speak

clearly, his mind was groggy, he lost consciousness, and he had a memory loss. The jury was permitted to decide he actually lost consciousness and suffered memory loss, even if he may have chosen not to identify his assailant. The evidence was more than sufficient to show this was no ordinary assault. The evidence of a severe beating with substantial injuries and disfigurement and with loss of function of his voice and mind was more than sufficient to support the jury verdict.

CROSS APPEAL

ISSUE FOUR

Did the Trial Court err when it decided not to give an instruction that would have informed the jury, assisted the State to argue its case more clearly, and was a correct statement of the law?

The Trial Court erred when it did not give the jury the State's requested instruction on "disfigurement."

The State recognizes a trial court has considerable discretion in wording jury instructions. *Atkinson*, 113 Wn.App. at 666-667. The State believes, however, that if this matter is returned to the trial court for any reason, the trial court should provide the disfigurement instruction found in *Atkinson.*

The State proposed an instruction that read:

> "Disfigurement" means that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or impairs in some manner.

(CP 62).[6]

The Court would not give the "disfigurement" instruction because it believed the word disfigurement is not "a hard word for the jury to figure out and I don't think there's any question here that there was some disfigurement" (RP 9/13/2011 46) The Court was also concerned that "the definition almost takes away from the requirement that there has to be substantial disfigurement." The Court was reluctant to give the instruction because "I think it conflicts with [the "substantial"] element. So, in other words, say much smaller black eye, under this definition it seems to say okay, that can be a substantial disfigurement." (RP 9/13/2011 46-7)

State v. Knutz, 161 Wn.App. 395, 403, 253 P.3d 437 (2011), provides the rules for review:

> We review a challenge to a jury instruction de novo, evaluating the jury instruction "in the context of the instructions as a whole." *State v. Benn,* 120 Wn.2d 631, 654–55, 845 P.2d 289 (1993). " ' Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.' " *State v. Aguirre,* 168 Wn.2d 350, 363–64, 229 P.3d 669 (2010) (internal quotation marks omitted) (quoting *Keller v. City of Spokane,* 146 Wn.2d 237, 249, 44 P.3d 845 (2002)) (emphasis omitted). "Jury instructions are sufficient if they are readily understood and are not misleading to the ordinary mind." *State v. Sublett,* 156 Wn.App. 160, 183, 231 P.3d 231 (2010) (citing *State*

[6] Although the State offered the instruction as one accepted in *Atkinson,* the proffered instruction substituted the word "deforms" for the word "impairs" in the final section of the definition ("or impairs in some manner"), the language is substantially the same. The word "impairs" appears earlier in the definition, so no new meaning is incorporated.

> *v. Dana,* 73 Wn.2d 533, 537, 439 P.2d 403 (1968)), *review granted,* 170 Wn.2d 1016, 245 P.3d 775 (2010). "Even if an instruction may be misleading, it will not be reversed unless prejudice is shown by the complaining party." *Aguirre,* 168 Wn.2d at 364, 229 P.3d 669 (citing *Keller,* 146 Wn.2d at 249, 44 P.3d 845).

The State believes the Court erred in two regards. First, the Court apparently believed that "disfigurement" means more than it actually means, because the Court noted a jury could decide the term could apply to minor injuries. The State believes the term is not readily understood. In fact, the State believes the term is generally equated with "substantial" in everyday use. For example, a black eye is a disfigurement. For those who may believe disfigurement means something more...well, disfiguring – the definition would be helpful.

Second, the definition would assist the State to argue its version of events. As it now stands, the State has no definition upon which to argue that any injury or impairment is "disfiguring." The State believes a reasonable juror would want to know the definition of disfiguring before deciding whether the disfiguring is substantial. Without a definition that tells the jury that anything that "impairs or injures the beauty, symmetry, or appearance of a person or thing" is "disfiguring" the reasonable juror is left to conjecture whether, first, there is a disfigurement before deciding, second, whether it is substantial.

Third, as a matter of law, the Court erred in the manner in which it conflated "substantial" with "disfigurement." The State was attempting to point out that the two are separate terms. The State's definition correctly states the definition of "disfigurement" and is not misleading. On the other hand, Mr. Davis was against the instruction because it made it easier for the jury to understand that the two words have separate definitions. The definition provided by the State only provided a definition of "disfigurement." The jury would then have to decide whether a black eye, under the facts before them, is "substantial."

If the matter is remanded for any reason, the State requests the Court be ordered to provide a definition of disfigurement.

CONCLUSION

The State believes Mr. Davis received a fair trial. The deputy prosecutor did nothing that created reversible error. Even if he did commit error, which the State does not concede, it was neither flagrant or ill-intentioned. There is nothing in the record to show any juror saw the leg restraints. There is nothing in the record indicating Mr. Davis was unable to work with his attorney. The leg restraint was hidden from view so there was no appearance that was an affront to the dignity of the Court. The evidence was overwhelmingly beyond a doubt that Mr. Ekegren

suffered substantial bodily harm. The State requests, if this matter is remanded, that the Trial Court be ordered to provide a "disfigurement" instruction.

DEBORAH KELLY, Prosecutor

Lewis M. Schrawyer, #12202
Deputy Prosecuting Attorney

LEWIS M. SCHRAWYER, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm: That I sent a copy of this document to Jodi R. Backlund and Manek R. Mistry at backlundmistry@gmail.com on May 2, 2012.

DEBORAH KELLY, Prosecutor

Lewis M. Schrawyer, #12202
Deputy Prosecuting Attorney

CLALLAM COUNTY PROSECUTOR

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